

11 U.S.C. § 546(a)

McGinnis v. McGinnis,  
In re McGinnis,

Adv. No. 91-3315  
Case No. 386-35563-P11  
BAP No. OR-92-1604-JOR  
CA9 No. 93-36087

4/20/94 9th Cir (aff'd BAP, which rev'd ELP)

unpublished

Plaintiff Lew McGinnis brought an action as debtor in possession to avoid lien under § 544(a). In granting plaintiff's summary judgment, the Bankruptcy Court found that § 546(a) did not apply to debtor in possession. Following In re Softwaire Centre Int'l, Inc., 994 F.2d 682 (9th Cir. 1993), the Bankruptcy Appellate Panel held that § 546(a) applies to a debtor in possession and barred plaintiff's § 544 powers. The Ninth Circuit agreed that § 546(a) precluded plaintiff, as a debtor in possession, from exercising § 544 powers.

P94-5 (3)

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NOT FOR PUBLICATION  
UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

FILED

MAY 04 1994

CATHY A. CATTERSON, CLERK  
U.S. COURT OF APPEALS

In re: LEW STEWART MCGINNIS, dba: )  
LEW MCGINNIS CO., )

Debtor. )

LEW S. MCGINNIS; MICHAEL R. MASTRO, )

Appellant, )

v. )

KELLY MCGINNIS; DANNY MCGINNIS, )

Appellees. )

No. 93-36087

BAP No. OR-92-01604-JOR

U.S. BANKRUPTCY COURT  
DISTRICT OF OREGON  
FILED

MEMORANDUM\*

MAY - 4 1994

TERENCE H. DUNN, CLERK

BY WA DEPUTY

Appeal from the Ninth Circuit  
Bankruptcy Appellate Panel  
Jones, Ollason, and Russell, Judges, Presiding

Submitted, April 20, 1994\*\*

Before: POOLE, BEEZER, and T.G. NELSON, Circuit Judges.

Michael Mastro and Lew McGinnis (bankruptcy debtor), hereinafter "Lew", appeal the Bankruptcy Appellate Panel's (BAP) order reversing the bankruptcy court's summary judgment for Mastro and McGinnis in an adversary action brought by McGinnis's children, Kelly and Dan McGinnis. The McGinnis children are seeking to invalidate an agreement subordinating their liens on

\* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir. R. 36-3.

\*\* The panel unanimously finds this case suitable for decision without oral argument and denies the request for an en banc hearing. Fed. R. App. P. 34(a), 35(a); 9th Cir. R. 34-4.

real property owed by the debtor, Lew McGinnis, to those of Mastro. We have jurisdiction under 28 U.S.C. § 158. We review de novo a Bankruptcy Appellate Panel decision, Vanderpark Properties, Inc. v. Buchbinder (In re Windmill Farms, Inc.), 841 F.2d 1467, 1469 (9th Cir. 1988), and we affirm.

Lew contends that BAP erred by holding that a debtor-in-possession is subject to the same statute of limitations as an appointed trustee under the language of 11 U.S.C. § 546(a)(1). This contention lacks merit.

Section 546(a) of the Bankruptcy Code provides that actions brought under a variety of bankruptcy code provisions "may not be commenced after the earlier of 1) two years after the appointment of a trustee . . . or 2) the time the case is closed or dismissed." 11 U.S.C. § 546(a). This court in Upgrade Corp. v. Government Tech. Svcs., Inc. (In re Softwaire Centre Int'l, Inc.), 994 F.2d 682, 683-84 (9th Cir. 1993), following the reasoning of Zilkha Energy Co. v. Leighton, 920 F.2d 1520, 1523-24 (10th Cir. 1990), construed section 546(a) in light of 11 U.S.C. § 1107(a), which says that debtors-in-possession shall have the same powers and limitations as trustees. This court determined that section 546(a)'s limitations apply to debtors-in-possession as well as to trustees. Softwaire, 994 F.2d at 683. This court reasoned that Congress intended to limit actions filed by a debtor-in-possession to two years because section 1107 "'places a debtor in possession in the same shoes of a trustee in every way.'" 994 F.2d at 683. This court concluded that the statute of limitations period begins to run for a debtor-in-possession on the date a petition for reorganization under Chapter 11 is filed. Id.

Here, Lew is the debtor-in-possession. On October 16, 1986, Lew filed a Chapter 11 bankruptcy petition in the United States Bankruptcy Court, District of Oregon. The McGinnis children filed a complaint seeking a judgment declaring the Deeds of Trust to be valid, properly perfected, and to have priority over the Deed of Trust of Michael Mastro and declaring the subordination agreement to be invalid. On August 22, 1991, Lew answered Kelly and Danny McGinnis' complaint and alleged that their liens were unperfected under Washington law and invalid pursuant to 11 U.S.C. § 544. Because more than two years had passed between the filing of the Chapter 11 petition and Lew's claim, Lew's avoidance action is time-barred. See Softwaire, 994 F.2d at 683. Under section 546(a), Lew, as a debtor-in-possession, is precluded from exercising his section 544 powers. See id. Therefore, the BAP properly reversed the district court's grant of summary judgment on the ground that Lew's claim was barred by the two-year statute of limitations.

**AFFIRMED.**

W. A. GIBBERSON  
Clerk of Court  
ATTEST  
MAY 27 1994  
by: Wanya U. Fox  
Deputy Clerk

INTERNAL USE ONLY: Proceedings include all events.  
93-36087 Mastro, et al v. McGinnis

In re: LEW STEWART MCGINNIS,  
dba: LEW MCGINNIS CO.  
Debtor

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LEW S. MCGINNIS  
Appellant

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v.

KELLY MCGINNIS  
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DANNY MCGINNIS  
Appellee

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(See above)  
[COR LD NTC ret]

United States Bankruptcy Appellate Panel  
of the Ninth Circuit  
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125 South Grand Ave.  
Pasadena, California 91105

Telephone: (818) 583-7906

May 31, 1994

To: Clerk, Bankruptcy Court, District of OREGON

RE: In re MCGINNIS

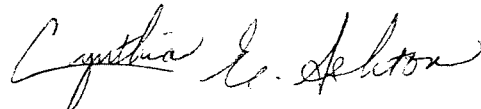
BAP No. OR-92-1604-JOR

Bkcy No. 386-05563-P11

Adv No. 91-3315

The judgment of this Panel entered on 9/27/93  
was appealed to the United States Court of Appeals for the  
Ninth Circuit. Attached is a copy of the mandate of the  
Court of Appeals.

Nancy B. Dickerson, Clerk

A handwritten signature in cursive script, appearing to read "Cynthia E. Ashton".

By: Cynthia E. Ashton  
Deputy Clerk